
A HISTORY OF THE TRANSNATIONAL ASPECTS OF UNITED STATES BANKRUPTCY LAW PRIOR TO THE BANKRUPTCY REFORM ACT OF 1978*

By Charles D. Booth**

I. INTRODUCTION

Over the past two centuries, the courts of the United States have wrestled with the questions of what effect to give to foreign bankruptcies and whether or not to recognize the claims of foreign representatives. The reforms of the Bankruptcy Reform Act of 1978 (the U.S. Bankruptcy Code)¹ provided a statutory framework to guide the courts in this difficult area involving transnational insolvency. Under current law, a foreign representative² may file a section 304³ petition to commence a case in the United States that is ancil-

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¹ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C.A. (West 1991), in scattered sections of 28 U.S.C.A. (West 1991), and in scattered sections of other titles). Unless otherwise indicated, all references in this article to "Section" will be to the applicable Section of the U.S. Bankruptcy Code.

² Section 101(24) defines "foreign representative" as a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding." 11 U.S.C.A. § 101(23) (West 1991).

³ Section 304 provides:

- (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
- (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
 - (1) enjoin the commencement or continuation of—
 - (A) any action against—
 - (i) a debtor with respect to property involved in such foreign proceeding; or
 - (ii) such property; or
 - (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

- (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
- (3) order other appropriate relief.
- (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—
 - (1) just treatment of all holders of claims against or interests in such estate;
 - (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - (3) prevention of preferential or fraudulent dispositions of property of such estate;
 - (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
 - (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C.A. § 304 (West 1991).

Section 304 cases reported to date include *In re Gercke*, 122 Bankr. 621 (Bankr. D.D.C. 1991); *In re Officina Conti, S.R.L.*, 118 Bankr. 392 (Bankr. D.S.C. 1989); *In re Papeleras Reunidas, S.A.* 92 Bankr. 584 (Bankr. E.D.N.Y. 1988); *Interpool, Ltd. v. Certain Freights of M/V Venture Star*, 102 Bankr. 373 (D.N.J. 1988), *appeal dismissed*, 878 F.2d 111 (3d Cir. 1989); *In re Banco Nacional de Obras y Servicios Publicos, S.N.C.*, 91 Bankr. 661 (Bankr. S.D.N.Y. 1988); *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); *In re Lines*, 81 Bankr. 267 (Bankr. S.D.N.Y. 1988); *In re Metzeler*, 78 Bankr. 674 (Bankr. S.D.N.Y. 1987); *In re Banco de Descuento*, 78 Bankr. 337 (Bankr. S.D. Fla. 1987); *In re Gee*, 53 Bankr. 891 (Bankr. S.D.N.Y. 1985); *In re Trakman*, 33 Bankr. 780 (Bankr. S.D.N.Y. 1983); *Angulo v. Kedzep, Ltd.*, 29 Bankr. 417 (S.D. Tex. 1983); *In re Toga Mfg. Ltd.*, 28 Bankr. 165 (Bankr. E.D. Mich. 1983); *In re Egeria Societa Per Azioni di Navigazione*, 26 Bankr. 494 (Bankr. E.D. Va. 1983), *rev'd sub nom.* Ciel y Cia S.A. v. Nereide Societa di Navigazione Per Azioni, 28 Bankr. 378 (E.D. Va. 1983), *appeal dismissed sub nom.* Ciel y Cia S.A. v. Commissioner of Egeria Societa di Navigazione Per Azioni, 723 F.2d 900 (4th Cir. 1983); *In re Culmer*, 25 Bankr. 621 (Bankr. S.D.N.Y. 1982); *In re Egeria Societa Per Azioni di Navigazione*, 20 Bankr. 625 (Bankr. E.D. Va. 1982), *rev'd sub nom.* Ciel y Cia S.A. v. Nereide Societa di Navigazione Per Azioni, 28 Bankr. 378 (E.D. Va. 1983), *appeal dismissed sub nom.* Ciel y Cia S.A. v. Commissioner of Egeria Societa di Navigazione Per Azioni, 723 F.2d 900 (4th Cir. 1983); *In re Stuppel*, 17 Bankr. 413 (S.D. Fla. 1981); *In re Lineas Areas de Nicaragua, S.A.*, 13 Bankr. 779 (Bankr. S.D. Fla. 1981); *In re Lineas Aereas de Nicaragua S.A.*, 10 Bankr. 790 (Bankr. S.D. Fla. 1981); *In re Comstat Consulting Servs. Ltd.*, 10 Bankr. 134 (Bankr. S.D. Fla. 1981).

For detailed analyses of Section 304, see Booth, *Recognition of Foreign Bankruptcies*, *supra* note *, at Part II.A.; Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729, 739-50 (1987); Finister, *1988 Developments and the Conflicts Arising Under Section 304*, 6 Bankr. Dev. J. 345 (1989); Gallagher & Hartje, *The Effectiveness of Section 304 in Achieving Efficient and Economic Equity in Transnational Insolvency*, ANN. SURV. BANKR. L. 1, 3-21 (1983); Gitlin & Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 BUS. LAW. 307, 315-22 (1987); Gitlin, Flaschen & Grimes, *American Reports — United States Treatment of Foreign Insolvency Proceedings*, in CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS 71-88 (I. Fletcher ed. 1990); Given & Vilaplana, *Comity Revisited: Multinational Bank-*

lary to a foreign proceeding.⁴ Rather than file a petition under section 304, the foreign representative may: (1) file a petition under section 303(b)(4) to commence an involuntary case against the foreign debtor under chapter 7 (liquidation) or chapter 11 (reorganization);⁵ (2) seek dismissal of a case or suspension of all proceedings under section 305(a)(2);⁶ or (3) vacate attach-

ruptcy Cases Under Section 304 of the Bankruptcy Code, 1983 ARIZ. ST. L.J. 325, 329-40 (1983); Glosband & Katucki, *Current Developments in International Insolvency Law and Practice*, 45 BUS. LAW. 2273 (1990); Goldie, *The Challenge of Transnational Expectations and the Recognition of Foreign Bankruptcy Decrees—The United States Adjustment*, 58 BRIT. Y.B. OF INT'L L. 303, 308-23, 329-39 (1987); Lam, *Bankruptcy Code Section 304(b)(3): "Other Appropriate Relief" for Multinational Bankruptcy*, 16 BROOKLYN J. INT'L L. 479 (1990); Morales & Deutch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1583-97 (1984); Nadelmann, *The Bankruptcy Reform Act and Conflict of Laws: Trial-and-Error*, 29 HARV. INT'L L.J. 27, 35-46 (1988) [hereinafter *The Bankruptcy Reform Act*]; Powers & Mears, *Protecting a U.S. Debtor's Assets in International Bankruptcy: A Survey and Proposal for Reciprocity*, 10 N.C.J. INT'L L. & COM. REG. 303, 341-46 (1985); Stevens, *The Interpenetration of Foreign Bankruptcy Laws in Domestic Proceedings Under H.R. 8200*, 52 AM. BANKR. L.J. 61 (1978); Trautman, *Foreign Creditors in American Bankruptcy Proceedings*, 29 HARV. INT'L L.J. 49 (1988); Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153, 1167-78 (1985); Comment, *1988 Developments and the Conflicts Arising Under Section 304*, 6 BANKR. DEV. J. 345 (1989); Comment, *In the Matter of Toga Mfg. Ltd.: A Step in the Wrong Direction for International Bankruptcy*, 2 INT'L PROP. INVESTMENT J. 633, 640-51 (1986) [hereinafter Comment, *In the Matter of Toga*]; Note, *Section 304 of the Bankruptcy Code: Has It Fostered the Development of an "International Bankruptcy System"?*, 22 COLUM. J. TRANSNAT'L L. 541, 549-73 (1984) [hereinafter Note, *Section 304*].

⁴ Section 101(23), in turn, defines "foreign proceeding" as a "proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization." 11 U.S.C.A. § 101(22) (West 1991).

⁵ Section 303(b)(4) provides:

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under Chapter 7 or 11 of this title [11 U.S.C.A. §§ 701 et seq., 1101 et seq. (West 1991)] . . .

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

Id. § 303(b)(4). See, e.g., *In re Axona Int'l Credit & Commerce Ltd.*, 88 Bankr. 597, 606, 614-15 (Bankr. S.D.N.Y. 1988) (construing Section 303(b)(4) in the context of a Chapter 7 case), *aff'd*, 115 Bankr. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991). A foreign debtor may also file a petition under Section 301 to commence a voluntary case under Chapter 7 or 11. 11 U.S.C.A. § 301 (West 1991). Creditors may commence an involuntary case under chapter 7 or 11 under Section 303. *Id.* § 303.

⁶ 11 U.S.C.A. § 305(a)(2), (b) (West 1991). See, e.g., *Axona*, 88 Bankr. at 607-13.

ments under state law.⁷ These remedies presently available to a foreign representative under the U.S. Bankruptcy Code and state law are not discussed here. Rather, this article examines the development in the major cases and scholarly works addressing the recognition of foreign bankruptcies and foreign representatives prior to the Bankruptcy Reform Act of 1978. Many of the principles developed over the past two centuries have been incorporated into the current U.S. statutory regime. These principles, as well as the cases in which they were originally espoused, are discussed in many of the recent judicial opinions resolving transnational insolvency issues.

II. CONTRASTING APPROACHES TO RESOLVING TRANSNATIONAL BANKRUPTCY PROBLEMS⁸

Scholars have developed two approaches to resolve cross-border insolvency problems: the "personalist," "unity," or "universality" approach (the "universality" approach) and the "realist," "plurality," or "territoriality" approach (the "territoriality" approach).⁹ The goal of the universality approach is the simplification and unification of transnational insolvency proceedings.¹⁰ Under this theory, a central bankruptcy proceeding (intended to resolve all claims against the debtor's estate worldwide) occurs in the jurisdiction in which the debtor is domiciled or where the debtor's principal place of business is located. A trustee is appointed in this central proceeding. To collect the assets of the debtor worldwide and to seek the turnover of all such assets to the central proceeding, the trustee travels abroad and commences ancillary proceedings in each country in which assets of the foreign debtor are located. In each of these ancillary proceedings the court gives effect to the declaration of bankruptcy in the central proceeding, recognizes the claims of the trustee (foreign representative), and orders the turnover of all local assets to the central proceeding, as well as applies the substantive laws of the country in which the central proceeding is occurring. Since the final adjudication in the central proceeding is to be respected by all jurisdictions, all creditors worldwide must submit claims in the central proceeding or forever be barred from pursuing their claims.¹¹

The primary advantage of the universality approach is equality of distri-

⁷ See, e.g., *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987); *Cunard Steamship Co. v. Salen Reefer Servs. A.B.*, 773 F.2d 452 (2d Cir. 1985).

⁸ This section is substantially adapted from Booth, *Recognition of Foreign Bankruptcies*, *supra* note *, at Part I.

⁹ See generally J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 403-09, at 565-72 (8th. ed. 1883); L. BLOM-COOPER, BANKRUPTCY IN PRIVATE INTERNATIONAL LAW 11-12 (1954); Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 633-35 (1980); Powers & Mears, *supra* note 3, at 305-07; Unger, *supra* note 3, at 1154-55.

¹⁰ See generally sources cited *supra* note 9.

¹¹ Unger, *supra* note 3, at 1154; L. BLOM-COOPER, *supra* note 9, at 11; Honsberger, *supra* note 9, at 633. See also J. STORY, *supra* note 9, §§ 403-09, at 565-72.

bution among creditors worldwide, because all claims will be administered by the same court and under the same law. Moreover, since duplicative proceedings and litigation are avoided, distributions will most likely be higher and the administration of claims certainly more efficient, than if each jurisdiction pursued independent, full bankruptcy proceedings. Of course, certain creditors who would have benefitted from local priorities or preferences in their home countries are disadvantaged by the universality approach and might suffer hardship, including inconvenience or extra expense from being forced to participate in the central proceeding where applicable procedural and substantive laws may differ from those of their home jurisdiction.¹²

The contrasting territoriality approach stresses the inherent powers of a jurisdiction to adjudicate with respect to the *res* or property only within such jurisdiction. Under this approach, a trustee appointed in the original bankruptcy proceeding is limited to administering assets within his home jurisdiction. Courts in other jurisdictions will not recognize the original declaration of bankruptcy and will adjudicate claims to the assets of the debtor that are located in their jurisdictions, often in separate, full bankruptcy proceedings. Creditors will file claims in the proceedings occurring in the respective jurisdictions.

The advantages of the territoriality approach are limited to local creditors who will benefit from local preferences and not suffer the inconvenience or expense of being compelled to prove their claims abroad under foreign law. The primary disadvantage of the territoriality approach is that it rejects the principle of equality of distribution in favor of a regime that rewards the fastest moving creditors. Of course, the multiplicity of bankruptcy proceedings will result in duplicative administrative expenses (and correspondingly lower distributions), inefficiency, and a less certain international climate for transacting business.¹³

Although the two approaches described above do not exist in a pure form in any country, they are very useful in structuring the debate about cross-border insolvency, and specifically the transnational aspects of United States bankruptcy law. It will be seen that United States courts at first followed the territoriality approach, but later responded inconsistently to the issues raised by the recognition of foreign bankruptcy proceedings and the claims of foreign representatives. Finally, a growing number of reported cases in the decade preceding the Bankruptcy Reform Act of 1978 revealed a trend away from the parochial use of the territoriality approach and toward increased cross-border cooperation under either a pro-recognition comity approach or the universality approach. Moreover, as the United States courts slowly adapted to a more international and integrated world scene, it became apparent that the rudimentary nature of the United States statutory and case law was insufficient to handle the increasingly complicated issues arising in transnational insolvencies.

¹² Unger, *supra* note 3, at 1154-55.

¹³ *Id.* at 1155; see also Honsberger, *supra* note 9, at 634-35.

III. HISTORICAL DEVELOPMENT OF THE TRANSNATIONAL ASPECTS OF UNITED STATES INSOLVENCY LAW¹⁴

A. *The Early Cases: The Territoriality Approach*

An analysis of the transnational aspects of United States insolvency law must begin with Article I, section 8, clause 4 of the United States Constitution, which provides that "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."¹⁵ During the first century of nationhood, Congress enacted uniform laws on the subject of bankruptcies three times—from 1800 to 1803, 1841 to 1843, and 1867 to 1878.¹⁶ These early statutes did not address the problems relating to cross-border bankruptcies, such as what effect to give to foreign bankruptcy adjudications or whether to allow foreign representatives to claim assets of nonresident or foreign debtors located in the United States.¹⁷ Moreover, these early statutes did not provide for jurisdiction over nonresident debtors.¹⁸ During the many years when the early federal statutes were not in effect, the states were allowed to enact their own insolvency laws.¹⁹ Therefore, courts in some of the early cases wrestled with the problem of

¹⁴ For further, at times conflicting, interpretations of this history, see Boshkoff, *supra* note 3, at 732-38; Comment, *In the Matter of Toga*, *supra* note 3, at 639-41, 645-49; Gallagher & Hartje, *supra* note 3, at 10-11, 15-16; Gitlin, Flaschen & Grimes, *supra* note 3, at 69-71; Honsberger, *supra* note 9, at 635-36, 663-64, 667-69; Morales & Deutch, *supra* note 3, at 1575-83; Nadelmann, *Codification of Conflicts Rules for Bankruptcy*, 30 ANN. SUISSE DR. INT'L 57, 84-85 (1974) [hereinafter *Conflicts Rules For Bankruptcy*]; Nadelmann, *The Bankruptcy Reform Act*, *supra* note 3; Nadelmann, *The Lure in "International Bankruptcies" of Assets Located Abroad*, 33 INT'L & COMP. L.Q. 431, 435-36 (1984); Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 HARV. L. REV. 1025, 1035-39, 1043-45 (1946) [hereinafter *The National Bankruptcy Act*]; Note, *Section 304*, *supra* note 3, at 544-49; Paskay, *Impact of the Bankruptcy Reform Act of 1978 on Foreign Debtors and Creditors*, 12 STETSON L. REV. 321, 322-36 (1983); Riesenfeld, *The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey*, 24 AM. J. COMP. L. 288, 290-96 (1976); Unger, *supra* note 3, at 1155-67.

¹⁵ U.S. CONST., art. I, § 8, cl. 4.

¹⁶ Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19 (repealed 1803); Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440 (repealed 1843); Act of Mar. 2, 1867, ch. 176, §§ 11, 39, 14 Stat. 517, 521, 536 (repealed 1878).

¹⁷ Paskay, *supra* note 14, at 322. See also Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U. L. REV. 1, 11 (1977) [hereinafter *Rehabilitating International Bankruptcy Law*].

¹⁸ Nadelmann, *Rehabilitating International Bankruptcy Law*, *supra* note 17, at 11. See also Paskay, *supra* note 14, at 322.

¹⁹ The state insolvency laws also did not generally provide for jurisdiction over nonresident debtors. Nadelmann, *The National Bankruptcy Act*, *supra* note 14, at 1035-36; Nadelmann, *Rehabilitating International Bankruptcy Law*, *supra* note 17, at 11; Paskay, *supra* note 14, at 322.

what effect to give to bankruptcies adjudicated in other states,²⁰ as well as in other countries.

Early on, in adjudicating cases involving the attachment of assets in the United States made prior to foreign adjudications of bankruptcy, the United States courts adopted a strict territoriality approach and rejected the claims of foreign representatives to such assets.²¹ This hostility is evident in the early U.S. Supreme Court case of *Harrison v. Sterry*.²² The case involved Bird, Savage & Bird, a British partnership that also carried on business in the United States as Robert Bird & Co.²³ Bird, Savage & Bird was adjudicated bankrupt in Great Britain in June 1803,²⁴ and Robert Bird was adjudicated bankrupt in the United States in December 1803.²⁵ At issue in the case was a contest for the assets of the partnership in the United States, among (1) the holder of a deed of assignment for the benefit of creditors²⁶ (signed by Robert Bird on behalf of both Bird, Savage & Bird and Robert Bird & Co.);²⁷ (2) the United States as a creditor of the British firm;²⁸ (3) attaching American and British creditors;²⁹ (4) assignees in bankruptcy under the British commission of bankruptcy (the "British Foreign Representatives");³⁰ and (5) assignees in bankruptcy under the American commission of bankruptcy.³¹ Chief Justice Marshall ruled that since the assignment for the benefit of creditors was "a fraud on the bankruptcy laws" it was "no bar to the claim of the United States, or of the attaching creditors."³² He ruled that the United States was entitled to priority with respect to all of the assets.³³ He also held that since Robert Bird alone was a bankrupt under United States law, the claims of the American assignees extended only to Bird's share in the partnership assets in the United States,³⁴ which amounted to one-third of

²⁰ See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (reviewing a Louisiana court's refusal to enforce a discharge in bankruptcy obtained under a New York state insolvency statute).

²¹ See J. STORY, *supra* note 9, §§ 410-423(a), at 573-83. See also Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 260 (1888); Honsberger, *supra* note 9, at 635; Riesenfeld, *supra* note 14, at 290; Unger, *supra* note 3, at 1156; see also *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289 (1809).

²² *Harrison*, 9 U.S. at 289. See also cases cited in Nadelmann, *The National Bankruptcy Act*, *supra* note 14, at 1036 n.65.

²³ *Harrison*, 9 U.S. at 290.

²⁴ *Id.* at 293.

²⁵ *Id.*

²⁶ *Id.* at 289.

²⁷ *Id.* at 291.

²⁸ *Id.* at 289.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 301.

³³ *Id.* (pursuant to Act of Mar. 3, 1797, ch. 20, § 5, 1 Stat. 512, 515).

³⁴ *Harrison*, 9 U.S. at 301-02.

the total assets. Since the creditors' attachments were void as against the American assignees, the American assignees would come second in line after the United States. Thus, the creditors whose attachments were void as against the American assignees would have to share with the other general creditors (including those claiming under the avoided deed of assignment, even though they had not proven their debts in bankruptcy) in any distributions made by the American assignees.³⁵

In discussing the remaining two-thirds of the property at issue in the case, Justice Marshall set forth the territoriality principle for which *Harrison* is so well known. Marshall held that the liens of the attaching creditors (although void against the American assignees) were valid against the subsequent claim of the British Foreign Representatives, "[a]s the bankrupt[cy] law of a foreign country is incapable of operating a legal transfer of property in the United States."³⁶ Marshall thus set up a two-tiered system in which the interests of attaching local creditors were protected against foreign representatives claiming under foreign bankruptcy law, but not against American assignees claiming under United States bankruptcy law.³⁷

In the last paragraph of his decision, Justice Marshall reasoned that after satisfying the claims of the United States and the attaching creditors from the two-thirds of the property, any surplus should be distributed among all general creditors. In furthering this equality among the general creditors under United States law, dividends paid by the British Foreign Representatives and by the American assignees were to be taken into consideration. Thus, although Marshall refused to recognize the British adjudication for the purpose of determining the rights of the British Foreign Representatives *vis-a-vis* the rights of the holders of prior attachments, he did recognize the British adjudication for the more limited purpose of producing equality of distribution to all general creditors.³⁸

Almost two decades later, in *Ogden v. Saunders*,³⁹ the U.S. Supreme Court again followed the territorial approach. In this case, the Court upheld a Louisiana court's refusal to recognize a discharge obtained under a New York state insolvency act, although on somewhat narrower grounds than those

³⁵ *Id.* See Riesenfeld, *supra* note 14, at 291.

³⁶ *Harrison*, 9 U.S. at 302. See Riesenfeld, *supra* note 14, at 291-92.

³⁷ In his analysis of the attaching creditors' rights, Marshall did not address the issue of whether the attachments of the American creditors should be treated differently from those of the British creditors. Since he just referred to "attaching creditors," it appears that they were to be treated the same. *Harrison*, 9 U.S. at 301-02. Judge Lowell, writing in the 1880s, supported this view. Pursuant to his interpretation of the extant American case law, although attaching American creditors were preferred to foreign representatives, they were not preferred to attaching foreign creditors. Lowell, *Conflict of Laws*, *supra* note 21, at 261.

³⁸ *Harrison*, 9 U.S. at 302. See Riesenfeld, *supra* note 14, at 291-92.

³⁹ 25 U.S. (12 Wheat.) 213 (1827).

elucidated by Marshall in *Harrison*.⁴⁰ This case involved a suit on bills of exchange in a Louisiana court. The defendant pleaded his prior discharge under the New York insolvency law.⁴¹ The U.S. Supreme Court upheld the power of the states to enact their own insolvency laws during those periods when Congress had not established national insolvency laws.⁴² Although upholding the constitutionality of the discharge obtained under the insolvency law of New York, the Court also upheld the nonrecognition of the discharge by the Louisiana court.⁴³ In its decision, the Court criticized "the seeming inconsistency and national bias of the developing British case law" in favor of the extraterritorial effect of bankruptcies, and instead adopted the territoriality approach.⁴⁴

In Justice Story's view, the adoption of this territorial approach by the United States courts was justifiable. In his *Commentaries*, he argued that the principal objection to the universality approach, or in his words, "to the ubiquity of the operation of the bankrupt[cy] laws of a country,"⁴⁵ was that the universal operation could be prejudicial to the just rights of the American citizen.⁴⁶ He supported the "American Doctrine" in which the United States could reasonably prefer American attaching creditors to any foreign assignee and noted that "no other country has any right to question the determination."⁴⁷ Under Justice Story's interpretation, it followed that the United States could uphold the rights of local creditors against foreign representatives even when the local creditors made their attachments after the foreign bankruptcy decree;⁴⁸ and there is, in fact, later case support for that proposition.⁴⁹

Story, however, relying on *Ogden*, more narrowly interpreted the strict territoriality language in *Harrison*.⁵⁰ He argued that Marshall's statement in *Harrison* that "the bankrupt[cy] law of a foreign country is incapable of

⁴⁰ See J. STORY, *supra* note 9, § 421, at 580; see also Riesenfeld, *supra* note 14, at 293-94 (discussing J. Story).

⁴¹ *Ogden*, 25 U.S. at 214.

⁴² *Id.* at 264, 272-77, 369.

⁴³ *Id.* at 357, 369.

⁴⁴ Riesenfeld, *supra* note 14, at 293 (discussing *Ogden*, 25 U.S. at 360).

⁴⁵ J. STORY, *supra* note 9, § 410, at 573.

⁴⁶ *Id.* §§ 410, 414, at 573, 575; see Nadelmann, *Solomons v. Ross and International Bankruptcy Law*, 9 MOD. L. REV. 154, 164 (1946) (citing J. Story).

⁴⁷ J. STORY, *supra* note 9, § 410, at 573.

⁴⁸ *Id.* §§ 410-14, at 573-75; see also Nadelmann, *Conflicts Rules for Bankruptcy*, *supra* note 14, at 84 (citing J. Story, *supra* note 9).

⁴⁹ Nadelmann, *Conflicts Rules for Bankruptcy*, *supra* note 14, at 84 n.161 (citing Clark v. Williard, 294 U.S. 211 (1935)). See also Lowell, *supra* note 21, at 261. But see Martyne v. American Union Fire Ins. Co., 216 N.Y. 183, 110 N.E. 502 (1915) (preferring the claim of an out of state statutory liquidator over a local creditor who made his attachment after the commencement of the out-of-state insolvency).

⁵⁰ J. STORY, *supra* note 9, § 421, at 580 (citing relevant cases). See Riesenfeld, *supra* note 14 at 293; Honsberger, *supra* note 9, at 635.

operating a legal transfer of property in the United States"⁵¹ demonstrated "that the court [was] examining the point only as between the conflicting rights of the assignees and those of the attaching creditors, and not in relation to the bankrupt himself."⁵² In Story's view, transnational insolvency problems should be resolved in accordance with principles of comity (and not international law), but "only so far as may be done without impairing the remedies, or lessening the securities, which our laws have provided for our own citizens."⁵³ Thus, as a matter of comity, United States courts might recognize the title of foreign representatives, so long as the interests or remedies of U.S. citizens were not impaired. This view represents a more flexible approach to transnational insolvency problems. Although Story's approach was still fundamentally territorial in outlook, it acknowledged the legitimacy of the universal application of insolvency laws in certain situations.⁵⁴

Story's view of comity as a basis for the recognition of a foreign bankruptcy adjudication was cited and followed in the New York case of *In re Accounting of Waite*.⁵⁵ The court in this case not only recognized an English bankruptcy adjudication, but also ordered the turnover of funds to an English trustee for distribution in the English proceeding, after finding that local creditors would not be prejudiced. This case involved the bankruptcy of Pendle & Waite, a firm doing business in New York and London.⁵⁶ Waite was an American citizen residing in the United States, and Pendle was an English citizen who lived in England.⁵⁷ In 1881 the New York firm of Haynes & Sanger made an assignment to Pendle & Waite, and in 1882 Pendle & Waite filed a petition in England for liquidation by arrangement or composition.⁵⁸ The composition failed, the firm was adjudged bankrupt, and a trustee was appointed.⁵⁹

Meanwhile, Waite continued to act as assignee of Haynes & Sanger, but kept for himself all of the proceeds from the sale of the assets.⁶⁰ Waite petitioned a New York court to settle his accounts as assignee, and the English trustee intervened claiming that he was entitled to the amounts retained by Waite and that such amounts should be distributed in the English bankruptcy.⁶¹ The lower court ruled that New York did "not recognize the validity of foreign bankruptcy proceedings to transfer title to property of the

⁵¹ J. STORY, *supra* note 9, § 421, at 580 (citing *Harrison*, 9 U.S. at 302).

⁵² *Id.* See also *id.* § 420, at 579-80; Riesenfeld, *supra* note 14, at 294.

⁵³ J. STORY, *supra* note 9, § 414, at 575; see also Paskay, *supra* note 14, at 324 (discussing J. STORY, *supra* note 9).

⁵⁴ But see Paskay, *supra* note 14, at 324 (contrasting Story's approach with the "parochial philosophy expressed by Justice Marshall in *Harrison*").

⁵⁵ *In re Accounting of Waite*, 99 N.Y. 433, 450 (1885).

⁵⁶ *Id.* at 436.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 437.

⁶⁰ *Id.*

⁶¹ *Id.*

bankrupt situated [in New York]"⁶² and upheld the payments that Waite had made to himself as assignee.⁶³

On appeal, the New York Court of Appeals first noted that because Waite had voluntarily submitted to the jurisdiction of the bankruptcy court in England, he was bound by its ruling.⁶⁴ Next, the court stated that there was no conflict between local creditors and a foreign trustee and that no injustice would be done to local creditors by ordering a transfer of funds abroad.⁶⁵ After reviewing the applicable case law, the court stated that although the statutory title of foreign assignees was not valid in New York "solely by virtue of the foreign statute,"⁶⁶ the comity of nations justified recognizing the title of a foreign representative when this could be done without adversely affecting domestic citizens or creditors, provided also, that such titles were not in conflict with the laws or the public policy of New York.⁶⁷ Since these criteria were fulfilled and the recognition would cause no harm to local interests or policies, the court recognized the English proceedings and ordered the money Waite had misappropriated to be turned over to the foreign trustee for distribution abroad to the bankrupt's creditors.⁶⁸

B. *The Emergence of the Universality Approach*

In *Waite* the court based its use of comity on a lack of harm to United States creditors under the territoriality approach rather than under the universality approach. In its decision, the *Waite* court failed to discuss, or even mention, *Canada Southern Railway Co. v. Gebhard*,⁶⁹ a U.S. Supreme Court case decided two years earlier. *Gebhard* was the first important United States case to adopt the universality approach in resolving problems arising in a transnational insolvency setting and to apply a universality-based doctrine of comity to the detriment of United States creditors.

The Canada Southern Railway Company was a Canadian corporation formed by the Canadian government in 1868 to build and operate a railroad in Ontario.⁷⁰ The railway issued secured bonds to finance its operations.⁷¹ In the 1870s when it became apparent to the railroad that it would be unable to meet its interest obligations under the bonds, the company proposed a scheme of arrangement for the financial restructuring of the company that

⁶² *Id.* at 437.

⁶³ *Id.* at 437-38.

⁶⁴ *Id.* at 439, 449.

⁶⁵ *Id.* at 439.

⁶⁶ *Id.* at 448.

⁶⁷ *Id.*

⁶⁸ *Id.* at 449, 451. See also *Irwin v. Granite State Provident Ass'n*, 30 A. 680 (N.J. Ch. 1897) (applying a territoriality-based notion of comity in this inter-state case involving the issue of what assistance to grant the domiciliary receiver of an out-of-state company).

⁶⁹ 109 U.S. 527 (1883).

⁷⁰ *Id.* at 528.

⁷¹ *Id.* at 528-29.

involved the exchange of new bonds for existing bonds.⁷² The new bonds would mature later, pay a lower interest rate than the original bonds, and would not include payment on the past due coupons or extension bonds.⁷³ More than two-thirds of the stockholders and three-quarters of the bondholders approved a scheme that was subsequently passed and assented to by the Parliament of Canada.⁷⁴

Two New York bondholders, however, objected to the arrangement and refused to exchange their old bonds for the new bonds as approved in the Canadian scheme.⁷⁵ They sued in New York to recover on the bonds and the railroad company pleaded the scheme of arrangement as a defense.⁷⁶ The circuit court held in favor of the bondholders and the U.S. Supreme Court reversed.

The New York bondholders asserted that since they had never assented to the Canadian arrangement, they should not be bound by it, and that the company, instead, should be bound to the conditions specified in the original bonds. The U.S. Supreme Court rejected this argument and held that the New York bondholders were bound by the Canadian arrangement even though they had never assented to it. The Court first noted that "[t]here is no constitutional prohibition in Canada against the passage of laws impairing the obligations of contracts."⁷⁷ The Court further noted that the Canadian Parliament approved the scheme of arrangement; that the scheme resembled a composition in bankruptcy and that in a bankruptcy a person "must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained";⁷⁸ and that the "corporation [was] created for a public purpose . . . and was subject to the exclusive legislative authority of the [Canadian P]arliament."⁷⁹ The Court also stressed that a large majority of the shareholders and bondholders had approved the scheme and that the Canadian Parliament had the power to approve the scheme and to bind all parties to its terms.⁸⁰

The Court rejected the territoriality contentions of the New York bondholders that it would be unfair to force them to litigate their claims in Canada under Canadian law. The Court claimed that "every person who deals with a foreign corporation impliedly [sic] subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy [as]

⁷² *Id.* at 529-30.

⁷³ *Id.* at 530.

⁷⁴ *Id.*

⁷⁵ *Id.* at 531.

⁷⁶ *Id.*

⁷⁷ *Id.* at 532.

⁷⁸ *Id.* at 536.

⁷⁹ *Id.*

⁸⁰ *Id.* at 538.

that government authorizes.”⁸¹ In addition, the court reasoned that the bondholders could have protected themselves against any unjust legislation of the Canadian government by refusing to deal with Canadian corporations.⁸²

The principle of equality of treatment of creditors and a more universalist application of comity also played important roles in the Court’s decision. In his dissent, Justice Harlan maintained that the discharge of the company’s obligation to pay the bonds according to their original terms could have no extraterritorial effect.⁸³ In support of his position he cited *Ogden v. Saunders* and Justice Story’s limited notions of comity based on a lack of harm to United States citizens under United States law.⁸⁴ The majority, however, rejected Harlan’s approach in favor of an approach that was more universalist in outlook and considered the just treatment of *all* creditors under Canadian law. Thus, rather than protecting the rights of two United States bondholders, the Court assured that *all* bondholders of the company, worldwide, would be treated the same. As the Court explained, the Canadian scheme of arrangement:

is in entire harmony with the spirit of bankrupt[cy] laws, the binding force of which, upon those who are subject to the jurisdiction, is recognized by all civilized nations. . . . Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. *Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.*⁸⁵

New ideas gain favor only with a convincing spokesperson, and Judge

⁸¹ *Id.* at 537.

⁸² *Id.* at 539.

⁸³ *Id.* at 544 (Justice Harlan dissenting).

⁸⁴ *Id.* at 544, 545 (Justice Harlan dissenting). Justice Harlan also noted that the creditors were not granted “their day in court, with opportunity to show that the proposed composition should not be made.” *Id.* at 543. The majority opinion never directly addressed this issue; it is difficult to discern from the opinion whether this was an issue that the bondholders had raised before the court. However, the court did note that the two dissenting bondholders “did not take part in the appointment of the joint committee,” *id.* at 531, perhaps implying that the bondholders had not attempted to voice their objections to the scheme. The majority opinion also stressed certain examples of the fairness of the procedure, including that the scheme was approved by a majority of bondholders and creditors, *id.* at 530, 538, and that the Canadian Parliament, in sanctioning the scheme, had the power to consider the “interest of all concerned.” *Id.* at 539.

⁸⁵ *Id.* at 539 (emphasis added). Morales and Deutch limit the effect of *Gebhard* to cases in which “the international corporate debtor can truly be deemed to be serving a public interest function, or can claim special status as a quasi-governmental entity.” Morales & Deutch, *supra* note 3, at 1579.

For a lengthy discussion of *Gebhard* and related matters, see Nadelmann,

John Lowell rose to the task. He articulated a more explicit rationale why the parochial philosophy expressed in earlier cases such as *Harrison* should give way to more universalist notions.⁸⁶ He summarized the state of the law of the "American Approach," which was that if no local creditor had attached personal property, the foreign trustee would be recognized and allowed to take the property, but if local creditors had attached the property, even if after the date of the foreign decree, the local creditors' attachments would be upheld.⁸⁷ He asserted that "[o]ur motive is to aid our own creditors; but we do it, as it were, underhand, so that we have the discredit of a want of comity, and fail to reap its full advantages."⁸⁸

Writing in support of the universality approach, Lowell noted the role that comity played in prior cases, and stressed an even stronger rationale—that of equality of distribution. The observations contained in his seminal article, *Conflict of Laws as Applied to Assignments for Creditors*,⁸⁹ written more than a hundred years ago, still ring true today:

It is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus *share alike*, and better for the debtor, because all his creditors would be equally bound by his discharge.⁹⁰

What is even more striking about Lowell's vision is that he contemplated a provision whereby a United States court could supervise an ancillary administration and assist a primary proceeding abroad. As Judge Lowell explained, "[i]f there is inconvenience in proving debts in a foreign country, ancillary administration might be granted here, as is done upon the estate of a deceased person."⁹¹ Lowell concluded his observations by noting that "[i]t is not . . . our purpose in this article to recommend a general bankrupt law."⁹² In some of his other writings, however, Lowell did propose changes in bankruptcy law to further equality of distribution. Perhaps his most important proposal for reform, adopted in Section 2 of the United States Bankruptcy Act of 1898 (U.S. Bankruptcy Act), was to make the presence of assets in the United States a basis for jurisdiction in bankruptcy cases.⁹³ This change enabled creditors or the foreign debtor (but not the foreign represen-

Compositions—Reorganizations and Arrangements—In the Conflict of Laws, 61 HARV. L. REV. 804 (1948).

⁸⁶ See Lowell, *supra* note 21, at 262-64.

⁸⁷ *Id.* at 261.

⁸⁸ *Id.* at 262.

⁸⁹ 1 HARV. L. REV. 259 (1888).

⁹⁰ *Id.* at 264 (emphasis added).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Section 2 of the U.S. Bankruptcy Act invested United States bankruptcy courts with the jurisdiction to adjudge persons bankrupt:

tative) to petition for the commencement of a bankruptcy case against a foreign debtor with assets in the United States, thereby enabling a trustee to exercise statutory avoiding powers and invalidate all preferential transfers of property of the bankruptcy estate made within four months of the commencement of the case and to avoid attachments that would have been upheld under nonbankruptcy law. In other words, this change enabled United States bankruptcy proceedings to cooperate with foreign proceedings to further the universality principle of equal distribution of assets to all creditors.⁹⁴

C. *U.S. Supreme Court Allows Territoriality to Strike Back: Upholding the Right of States to Apply a Narrow Notion of Comity*

In the famous 1895 case of *Hilton v. Guyot*,⁹⁵ the U.S. Supreme Court retreated from the more expansive universality principles emerging in *Gebhard* and the writings of Lowell. In *Hilton*, the liquidator of a French firm sued two United States citizens, Henry Hilton and William Libbey, to enforce a judgment recovered in a French court for their debts to the defunct

who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or

who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or

who have been adjudged bankrupt by courts of competent jurisdiction without the United States and have property within their jurisdictions.

U.S. Bankruptcy Act of 1898, Bankruptcy Act of July 1, 1898, ch. 541 § 2(a)(1), 30 Stat. 545. See Nadelmann, *The National Bankruptcy Act*, *supra* note 14, at 1035-39 (discussing Lowell's proposal contained in Section 106 of the Lowell Bill, S. 1382, 47th Cong., 2d Sess. (1882)); Nadelmann, *Conflicts Rules for Bankruptcy*, *supra* note 14, at 75-76, 84.

In 1938, the first part was amended as follows:

who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction.

U.S. Bankruptcy Act, § 2(a)(1), 52 Stat. 842 (1938). See Nadelmann, *The National Bankruptcy Act*, *supra* note 14, at 1038.

Regarding the ability of a trustee in a bankruptcy commenced in the United States to claim assets located abroad, the situation was less clear under U.S. Bankruptcy Act. Professor Nadelmann argued that a trustee could claim assets abroad, *id.* at 1029-31, but noted that it would be helpful if the U.S. Bankruptcy Act more explicitly stated that United States trustees were vested with title to property located abroad. *Id.* at 1030-31. See U.S. Bankruptcy Act, § 70(a)(5), 30 Stat. 566 (1898) (amended 1938); *Id.* § 7(a)(5), 52 Stat. 847 (1938). This clarification, in fact, was made in the 1952 amendments to the U.S. Bankruptcy Act. Pub. L. No. 82-456, 66 Stat. 420 (1952). See Nadelmann, *Revision of Conflicts Provisions in the American Bankruptcy Act*, 1 INT'L & COMP. L.Q. 484 (1952) [hereinafter *Revision of Conflicts Provisions*]; Honsberger, *supra* note 9, at 660.

⁹⁴ See, e.g., *supra* text accompanying notes 200-60. See also Nadelmann, *Revision of Conflicts Provisions*, *supra* note 93, at 490; Nadelmann, *Rehabilitating International Bankruptcy Law*, *supra* note 17, at 11.

⁹⁵ *Hilton v. Guyot*, 159 U.S. 113 (1895).

French firm.⁹⁶ The Court began its analysis by looking to the law of nations and to private international law. Given the absence of a treaty or statute, the Court examined the case law.⁹⁷ In the Court's view, the basic principle of international law was that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."⁹⁸ Therefore, "[t]he extent to which the law of one nation . . . shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"⁹⁹ The Court continued:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹⁰⁰

The difficulty, of course, is determining when such recognition should be made. The defendants asserted that the French judgment should not be enforced because it was obtained through a trial with different procedures than those in the United States—for instance, one of the plaintiffs was not permitted to testify under oath and was not subject to cross-examination by the defendants. But the Court was "not prepared to hold that the fact that the procedure in these respects differed from that of our own courts [was], of itself, a sufficient ground for impeaching the foreign judgment."¹⁰¹ The Court next addressed the possibility of impeaching the foreign judgment for fraud, but found it unnecessary to do so:

because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.¹⁰²

Under the court's reciprocity-based view of comity, foreign judgments rendered in countries that review United States judgments on the merits "are

⁹⁶ *Id.* at 114.

⁹⁷ *Id.* at 163.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 163-64.

¹⁰¹ *Id.* at 205.

¹⁰² *Id.* at 210. Similarly, Story acknowledged the relationship between comity and reciprocity. J. STORY, *supra* note 9, § 414, at 575. The debate about whether comity should be dependent on reciprocity continues to this day in regard to Section 304, as well as in regard to state law. See, e.g., Booth, *Recognition of Foreign Bankruptcies*, *supra* note * at Part II.A.4.; Boshkoff, *supra* note 3, at 734; Powers & Mears, *supra* note 3, at 346-51; Note, *Section 304*, *supra* note 3, at 556-57.

not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only."¹⁰³ This view of comity was much more protective of local creditor interests than that of *Gebhard*.

Thirteen years after *Hilton*, the U.S. Supreme Court again interpreted comity quite narrowly in *Disconto Gesellschaft v. Umbreit*,¹⁰⁴ a case in which the Court upheld a United States creditor's attachment of property in Wisconsin over a foreign creditor's prior attachment. In August 1901, the Disconto Gesellschaft, a German bank, garnished the First National Bank of Milwaukee for the amount of \$6,420 owed by the bank to Gebhard Terlinden to recover damages in tort.¹⁰⁵ Terlinden was a German resident who absconded from Germany to Wisconsin in July 1901.¹⁰⁶ A month later he was apprehended as a fugitive from justice and later extradited to Germany.¹⁰⁷ The defendant, Augustus Umbreit, a citizen of Wisconsin, intervened in the case, having also served a notice of garnishment on the First National Bank of Milwaukee in March 1904 for the amount of \$7,500, to recover a judgment debt owed by Terlinden to him.¹⁰⁸

In July 1901, bankruptcy proceedings in Germany were commenced against Terlinden.¹⁰⁹ A trustee was appointed and granted permission to Disconto Gesellschaft to try to recover, on behalf of the bankruptcy estate in Germany, the amount it had previously garnished from the First National Bank of Milwaukee.¹¹⁰

The Supreme Court of Wisconsin ruled in favor of its citizen Umbreit, even though Umbreit's claim and garnishment arose after the garnishment by the German bank.¹¹¹ The court reasoned that the fact that the German bank would remove the garnished assets to Germany to be distributed to German creditors "was against the public policy of Wisconsin, which forbade such discrimination as against a citizen of that State."¹¹²

The U.S. Supreme Court upheld the decision of the Wisconsin Supreme Court to protect its local creditor before satisfying the claim of a foreign creditor on behalf of a prior bankruptcy adjudication abroad. The Court noted that:

¹⁰³ *Hilton*, 159 U.S. at 227 (emphasis added). In contrast, foreign judgments rendered in countries that give full credit and conclusive effect to the judgments of United States courts should be held conclusive on the merits when sued upon in the United States. This was the holding in *Ritchie v. McMullen*, 159 U.S. 235, 242 (1895), a case involving a Canadian judgment and decided on the same day as *Hilton*. For further discussion of *Ritchie*, see Goldie, *supra* note 3, at 305-07 n.14, 328.

¹⁰⁴ 208 U.S. 570 (1908).

¹⁰⁵ *Id.* at 574-75.

¹⁰⁶ *Id.* at 576.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 575-76.

¹⁰⁹ *Id.* at 576.

¹¹⁰ *Id.* at 576-77.

¹¹¹ *Id.* at 577.

¹¹² *Id.* at 578.

what property may be removed from a State and subjected to the claims of creditors of other States is a matter of comity between nations and states and not a matter of absolute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction.¹¹³

In support of this proposition, the Court cited the definition of comity from *Hilton*, as well as the writings of Justice Story,¹¹⁴ yet ignored the equality of distribution principle and did not refer to *Gebhard*. The German government reacted to this decision by protesting to the United States government and threatening retaliation.¹¹⁵ However, as one commentator points out, the local creditor benefitted at the expense of the creditors of the foreign estate because the German bankruptcy administration mishandled the case: "If instead of trying to remove the assets from the United States, the German creditors had secured a bankruptcy declaration in the United States, the local assets would have been equally distributed among all creditors, local and distant."¹¹⁶ This was one of the very situations that Lowell's reforms were intended to address. *Disconto Gesellschaft* is important for yet another reason. In a non-bankruptcy case, it "leaves each state free to decide what, if any, type of co-operation will be forthcoming when a cross-border insolvency law occurs."¹¹⁷

In 1935 in *Clark v. Williard*,¹¹⁸ the U.S. Supreme Court relied on *Disconto Gesellschaft* in a matter arising at the state, rather than the international, level involving the Montana assets of an insolvent Iowa corporation. The Insurance Commissioner of Iowa, as the official liquidator of the Iowa corporation, asserted that his rights should have priority over the later executions of several local creditors.¹¹⁹ The U.S. Supreme Court upheld the Montana court's protection of its own creditors even after acknowledging that by so doing the race of the swiftest would prevail over notions of equal distribution.¹²⁰ The Court's rationale was that it was up to the state courts to determine "whether there was any local policy, expressed in statute or decision, whereby the title of a statutory successor was to be subordinated to

¹¹³ *Id.* at 578-79. Later in its opinion the court reiterated "the well-recognized rule between states and nations which permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond their borders." *Id.* at 582.

¹¹⁴ *Id.* at 579. (citing *Hilton*, 159 U.S. at 163, and J. STORY, *supra* note 9, § 33).

¹¹⁵ Nadelmann, *Legal Treatment of Foreign and Domestic Creditors*, 11 LAW & CONTEMP. PROBS. 696, 700 (1946).

¹¹⁶ *Id.* See also *Bank of Buffalo v. Vesterfelt*, 232 N.Y.S. 2d 783 (1962) (stating that it was not compelled by principles of comity to recognize Canadian bankruptcy proceedings and upholding garnishment by local creditor after the commencement of a bankruptcy under Canadian law).

¹¹⁷ Boshkoff, *supra* note 3, at 733.

¹¹⁸ 294 U.S. 211 (1935).

¹¹⁹ *Id.* at 212.

¹²⁰ *Id.*

later executions at the suit of local creditors.”¹²¹ The Court noted that the states had responded inconsistently to this problem: some states, such as New York, “prefer a rule of equal distribution,” at times subject to certain conditions, and that other states, notably California, Iowa, and Kentucky, instead “give the local creditor a free hand.”¹²² In this case, the “Supreme Court of Montana would speak the final word”¹²³—and the word was that the local creditors should prevail over the statutory successor to the corporation and “that the writs [of execution would] not be halted though the effect of the levy may be waste or inequality.”¹²⁴ The Court held that the statutory successor “must submit . . . to the mandate of the sovereignty that has the physical control of what he would reduce to his possession.”¹²⁵ Thus, although cases under the U.S. Bankruptcy Act furthered equality of distribution, in *Disconto Gesellschaft* and *Clark*, the U.S. Supreme Court upheld the right of the states in non-bankruptcy cases to enforce territoriality principles over universality principles, even when such enforcement might lead to a race of the swiftest and result in inefficiency and inequality. Of course, the States remained equally free to apply the universality rule of equal distribution, as did the New York court in *Martyne v. American Union Fire Ins. Co.*¹²⁶ (a case involving the claim of a statutory successor), but the U.S. Supreme Court refused to mandate the application of such a rule.

D. *Universality Reprise: Promoting Cross-Border Cooperation and Equality of Distribution in Two Important Insolvency Cases*¹²⁷

As noted earlier, in non-bankruptcy cases where foreign representatives claimed assets not attached by local creditors, the courts, following a territo-

¹²¹ *Id.*

¹²² *Id.* at 214-15 (citations omitted).

¹²³ *Id.* at 212.

¹²⁴ *Id.* at 213.

¹²⁵ *Id.* at 214.

¹²⁶ 216 N.Y. 183 (1915). In this case, the New York Court of Appeals affirmed an order to set aside the post-dissolution attachment by a local creditor against property claimed by the insurance commissioner of Pennsylvania as a statutory liquidator. The court acknowledged the principle “that the title of a receiver or assignee to property obtained by order of a court pursuant to insolven[cy] or bankruptcy laws of a foreign state has no extraterritorial force or authority and will not be sustained outside the limits of boundaries of a state as against a valid attachment levied upon such property,” *id.* at 192, but then differentiated the case at bar by noting that the insurance commissioner of Pennsylvania was a statutory liquidator, whose title could therefore be recognized. *Id.* at 192-93. In allowing the Pennsylvania liquidator to claim the property, the court followed a universality approach and noted that to uphold the local creditor’s attachment would enable him to gain a preference at the expense of the foreign corporation, *id.* at 194, and thereby at the expense of the other creditors. The court also stressed the earlier noted principle (as did the *Gebhard* court) that “[e]very person dealing with the [foreign] corporation did so with the knowledge of its charter and its charter rights.” *Id.* at 193.

¹²⁷ For a case in which a foreign representative tried to assert rights to real property,

riality approach, were generally cooperative, recognized foreign representatives and permitted them to take local assets back to primary proceedings abroad.¹²⁸ However, in two insolvency cases not involving local attachments, *In re Stoddard and Norske Lloyd Ins. Co.*¹²⁹ ("*Norske Lloyd*") and *In re Aktiebolaget Kreuger & Toll*¹³⁰ ("*Kreuger & Toll*"), the courts deviated from this approach, which justified cooperation solely on the basis of territoriality-based notions of comity, and instead cooperated with foreign proceedings on the basis of a more flexible approach that was also rooted in certain universality notions. In *Norske Lloyd*, a New York court ordered the transmittal of the local assets of an insolvent foreign insurance company in possession of the Superintendent of Insurance to a foreign representative for distribution abroad. This case involved the Norske Lloyd Insurance Company, Ltd. (Norske Lloyd), a Norwegian insurance company that also did business in New York.¹³¹ In accordance with New York law, Norske Lloyd deposited certain assets with the appropriate authorities.¹³² Subsequently, Norske Lloyd became insolvent—a primary receiver was appointed in Norway and a liquidator in England, and the Superintendent of Insurance took control of the assets in New York.¹³³ Three classes of claimants asserted claims to these assets: (1) United States residents or citizens issued policies by agencies of Norske Lloyd doing business in the United States; (2) United States residents issued policies by Norske Lloyd outside the United States; and (3) nonresidents of the United States issued policies by foreign agencies of Norske Lloyd outside the United States.¹³⁴

The Norwegian receiver and the British liquidator claimed that after paying off the first class in accordance with New York law, the Superintendent of Insurance should transfer the surplus to Norway for distribution.¹³⁵ The New York Court of Appeals agreed and held that after satisfying the claims of class (1) above, the Superintendent of Insurance had to transfer the sur-

see *In re Estate of Delahanty*, 11 Ariz. 366 (1908) (assistance to foreign representative not excluded to land).

¹²⁸ See, e.g. text accompanying *supra* notes 87-88 and discussion of *Waite* accompanying *supra* notes 55-68. See also *Fincham v. Income for Certain Trust Funds of Cobham*, 81 N.Y.S.2d 356 (1948) (relying on the territorial-based notions of comity in *Waite*, the court upheld the title of a British trustee to personal property in New York after finding that no injustice to local citizens or conflict with New York public policy would result).

¹²⁹ 242 N.Y. 148 (involving the administration of assets under New York insurance law).

¹³⁰ 20 F. Supp. 964 (S.D.N.Y. 1937), *aff'd*, 96 F.2d 768 (2d Cir. 1938) (decided under U.S. Bankruptcy Act).

¹³¹ *Norske Lloyd*, 242 N.Y. at 154.

¹³² *Id.* at 154-55.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 155-56.

plus of funds to the Norwegian receiver.¹³⁶ In reaching its holding, the court considered the doctrine of comity in a territoriality sense and equated arguments based on comity with arguments in favor of protecting local creditors. The case did not involve a dispute as to assets between a foreign receiver and local creditors holding liens.¹³⁷ Accordingly, the court noted that they knew of no "principle of equity, comity or public policy" that authorized the payment in full of local creditors before transferring the surplus abroad.¹³⁸

However, in its discussion of the ancillary nature of the proceeding in New York and of the principle of equality of distribution, the *Norske Lloyd* court espoused some universality principles. For example, the court described how the Superintendent was an ancillary receiver "who has been appointed in aid of and in subordination to a foreign receiver for the purpose of collecting and taking charge of the assets of the insolvent corporation in the jurisdiction where he is appointed."¹³⁹ Additionally, the court stressed that the principle of equality of distribution among similarly situated creditors justified the transfer of funds to the Norwegian receiver to be distributed *pro rata* to all creditors of *Norske Lloyd*:

All creditors of a corporation wherever residing are entitled in case of insolvency to have the general assets distributed among them upon principles of perfect equality. The courts of one State have no right to favor domestic creditors in the distribution but it must be made upon the principle that equality is equity.¹⁴⁰

After ordering that the surplus funds be sent to the primary proceeding abroad, the court ensured that "domestic assets will not as against domestic creditors be transmitted to a foreign receiver or liquidator if there is any danger that the latter's distribution thereof will be made in a manner unfair to the domestic creditors."¹⁴¹ The court acknowledged that there was no evidence that local creditors "would suffer from any unfair methods adopted by the foreign receiver."¹⁴² However, the court found that it would be unfair to require many of the local policyholders with small claims to incur the expenses of presentation and proof abroad, and therefore conditioned the transmittal of the funds abroad on the Norwegian proceedings' granting the holders of such small claims the opportunity to prove and defend their claims in the United States.¹⁴³ Overall, although the *Norske Lloyd* decision is

¹³⁶ *Id.* at 166-68.

¹³⁷ *Id.* at 163-64.

¹³⁸ *Id.* at 163.

¹³⁹ *Id.* at 164. By claiming that the ancillary receiver should not thwart the purposes of the primary receivership, the court also supported the economical and expeditious administration of the foreign proceedings. *Id.*

¹⁴⁰ *Id.* at 165 (citation omitted).

¹⁴¹ *Id.* at 167.

¹⁴² *Id.*

¹⁴³ *Id.* at 167-68.

still rooted in territorial notions of comity, it also espouses universality notions of equality of distribution and ancillary administration.

In the second case, *In re Aktiebolaget Kreuger & Toll*, the court based its cooperation in the transnational insolvency context even more fully on universality notions.¹⁴⁴ In March 1932 Swedish liquidation proceedings were commenced against Aktiebolaget Kreuger & Toll (Kreuger & Toll),¹⁴⁵ also known as the "Match King." Kreuger & Toll was organized under the Swedish Companies Act and had a capital structure consisting of ordinary shares, participating debentures, and secured debentures.¹⁴⁶ In June 1932 several American creditors who owned some of the secured debentures filed a bankruptcy petition in the United States.¹⁴⁷ At first, the Swedish liquidators and principal creditor groups opposed the American adjudication on the grounds "that the bankruptcy, being an international one, should be unified and concentrated in Stockholm."¹⁴⁸ Judge Julian M. Mack of the District Court for the Southern District of New York responded to these objections by ensuring that "*any action taken by this court will be taken with a view to the most earnest cooperation with the authorities in Sweden in the interest of all creditors.*"¹⁴⁹ The court added that the administration of assets in the United States "would be *without any thought of preferential treatment of American creditors unless indeed preferential treatment were given in Sweden as against American creditors*" and that the United States court in dealing with local assets "would be not only justified but morally and doubtlessly legally compelled to accord the same treatment to Swedish and other creditors as it would accord to American creditors."¹⁵⁰ Relying on Judge Mack's statements, the Swedish creditors and liquidators dropped their objections to the American proceedings.¹⁵¹ The promised cooperation between the American and Swedish authorities resulted in accumulation of US \$3,500,000 in the United States bankruptcy estate.¹⁵² At that point the issue of how to distribute these funds arose.

Lee Higginson, as trustee for the holders of the participating debentures, had filed a claim for payment on the participating debentures.¹⁵³ Two years later, after a series of appeals, the Swedish Supreme Court, the highest court in Sweden, held that "on liquidation in bankruptcy, holders of the 'Partici-

¹⁴⁴ 20 F. Supp. 964 (S.D.N.Y. 1937), *aff'd* 96 F.2d 768 (2d Cir. 1938).

¹⁴⁵ *Id.* at 965.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (quoting Judge Mack)(emphasis original).

¹⁵⁰ *Id.* at 965 (quoting Judge Mack)(emphasis original).

¹⁵¹ *Id.* at 965-66.

¹⁵² *Id.* at 966.

¹⁵³ *Id.* at 967.

pating Debentures' were to be paid out of the assets of the company *before* shareholders, but *after* all the other debts of the company had been paid."¹⁵⁴

The issue before the district court was what effect to give the Swedish Supreme Court's judgment. Discussing comity, the court considered the conflicting interpretations of *Hilton v. Guyot*.¹⁵⁵ The court noted that the majority of courts treated the foreign judgment as *prima facie* evidence, but that other courts treated the judgment as conclusive.¹⁵⁶ The court also noted that some earlier cases had adopted the reciprocity approach in *Hilton*, but then quoted Judge Learned Hand's clarification:

Whatever may be thought of that decision, [*Hilton v. Guyot*], the court certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here. *That doctrine I am happy to say is not part of American jurisprudence.*¹⁵⁷

Rather than blindly following the view espoused in *Hilton* that a foreign judgment is *prima facie* evidence only, the court stated that whether adopting either the narrow approach or the more universalist interpretation, it was "convinced that at bar a far stronger case for recognition of the Swedish judgment [was] presented than in *Hilton v. Guyot*."¹⁵⁸ In so finding, the court mentioned that no question had been raised regarding the jurisdiction of the foreign court, the propriety and impartiality of the Swedish proceedings, or any assertion of fraud.¹⁵⁹ Next, the court stated that it had not found "any clear and convincing evidence that the question was erroneously decided by the Swedish court."¹⁶⁰ In addition, the court noted that it was Lee Higginson who had invoked the jurisdiction of the Swedish courts and that the United States bondholders had received a full and fair opportunity to present their case there.¹⁶¹ Moreover, the court relied on an earlier case for the proposition similar to that espoused in *Gebhard*: "*When citizens of this country engage in an enterprise in a foreign country with respect to property there situated, they subject themselves to the laws, decisions, and decrees of its courts respecting such property and property rights.*"¹⁶²

Lastly, in reaching its decision the court addressed the issues of whether the Swedish judgment was contrary to United States public policy or whether there had been any valid reason advanced why the Swedish judg-

¹⁵⁴ *Id.* (emphasis original).

¹⁵⁵ *Id.* at 969 (citing *Hilton v. Guyot*, 159 U.S. 113 (1895)).

¹⁵⁶ *Kreuger & Toll*, 20 F. Supp. at 969.

¹⁵⁷ *Id.* (quoting Judge Hand, *Direction der Disconto-Gesellschaft v. U.S. Steel Corp.*, 300 F. 741, 747 (S.D.N.Y. 1924), *aff'd*, 267 U.S. 22 (1925))(emphasis original).

¹⁵⁸ *Kreuger & Toll*, 20 F. Supp. at 969.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 969-70.

¹⁶² *Id.* at 970 (citation omitted).

ment should not be enforced. In answering both of these questions in the negative, the court found that it was not the Swedish judgment that was contrary to public policy, but rather that the American debenture holders' arguments were contrary to public policy—that to allow their claims would be to give them preferential treatment to the detriment of the general creditors of Kreuger & Toll. Thus, the district court judge granted comity to the Swedish judgment and noted that "it is incumbent upon me to carry out Judge Mack's desire of co-operation between the Swedish liquidators and our own, provided I can do so in good conscience and in accordance with equitable principles."¹⁶³ In recognizing the Swedish judgment, the *Kreuger & Toll* court, like the *Norske Lloyd* court, upheld the equality of distribution principle over the parochial claims of the United States creditors. However, unlike the *Norske Lloyd* court, the *Kreuger & Toll* court sidestepped the issue of what theory of comity it was applying and instead rooted its holding more completely in universality principles.

E. *Into the 1970s: Territoriality Language, but Universality Policy — The Emergence of a Pro-Recognition Comity Approach*

In a growing number of reported cases in 1969 and onwards, many courts, although stating the comity test in terms of the protection of local creditors, began to accord comity to foreign bankruptcies and to grant the relief requested by foreign representatives.¹⁶⁴ Two of these cases, *Waxman v.*

¹⁶³ *Id.* For another case in which bankruptcy proceedings were commenced against a foreign debtor in the United States after proceedings were commenced against the foreign debtor abroad, see *In re Neidecker*, 82 F.2d 263 (2d Cir. 1936).

¹⁶⁴ See *Waxman v. Kealoha*, 296 F. Supp. at 1191 (D. Haw. 1969) (granting recognition to a Canadian decree and allowing a Canadian trustee in bankruptcy of a Hawaiian corporation to bring an action in Hawaii against Hawaiian citizens who were incorporators and stockholders of the corporation); *Clarkson Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976) (granting comity to a Canadian judgment and allowing a Canadian trustee in bankruptcy to obtain records located in New York offices of bankrupt Canadian corporations); *In re Colorado Corp.*, 531 F.2d 463, 469 (10th Cir. 1976) (holding that the bankruptcy court abused its discretion in not granting comity to the orders of Luxembourg and Netherlands Antilles courts appointing liquidators and trustees of two international investment trusts, thereby wrongly preventing these trusts from voting their claims in the election for the trustee of the debtor undergoing liquidation in the United States); *IIT v. Cornfeld*, 462 F. Supp. 209, 217 (S.D.N.Y. 1978) (dismissing claims for lack of subject matter jurisdiction, but first stating that "comity and practical sense require[d] recognition"); *Cornfeld v. Investor Overseas Servs., Ltd.*, 471 F. Supp. 1255 (S.D.N.Y. 1979) (granting comity to Canadian bankruptcy proceedings and dismissing an indemnity action brought by a former officer and director of a Canadian corporation undergoing reorganization in Canada against his former company), *aff'd*, 614 F.2d 1286 (2d Cir. 1979).

But see *Bank of Buffalo v. Vesterfelt*, 232 N.Y.S. 2d 783, 785 (1962) (refusing to grant comity to Canadian bankruptcy proceedings because to do so "would jeopardize the rights of a local creditor" who had garnished the wages of a Canadian debtor after the

*Kealoha*¹⁶⁵ and *Clarkson Co. v. Shaheen*,¹⁶⁶ exemplify the different ways in which courts in the United States, although continuing to apply "protection of local interests" terminology, began to limit the effect of the territoriality principle and to adopt a more universality-oriented, pro-recognition comity approach.

Waxman involved an action in the U.S. District Court for Hawaii brought by a Canadian bankruptcy trustee of a Hawaiian corporation to recover amounts owed by Hawaii citizens who were incorporators and stockholders of the corporation.¹⁶⁷ To resolve the issue of whether the court had jurisdiction over the parties and whether to allow the Canadian trustee to maintain his suit, the court briefly reviewed several different interpretations of comity: (1) the traditional rule that a trustee may not as a matter of right maintain an action in a foreign jurisdiction to recover assets,¹⁶⁸ (2) the rule that comity was dependent on reciprocity,¹⁶⁹ and (3) the fair play and justice rule, whereby if United States citizens have subjected themselves to foreign laws and have had the opportunity for a full and fair hearing, the foreign judgment will be upheld unless abuse is shown to have existed.¹⁷⁰ As in *Kreuger & Toll*, the court in *Waxman* did not adopt and apply one of these approaches. Instead the court simply stated:

United States courts, both state and federal, have taken the position that comity will be extended in situations such as the one at bar, unless to do so would prejudice local creditors and citizens. Defendant has failed to show that any local creditors would be prejudiced by extending comity to the Canadian decree. In fact, neither party has alleged the existence of any local creditors. Defendants have not shown why any defenses for non-payment of the stock subscriptions could not be adequately advanced here as they would be in some other court.¹⁷¹

In allowing the Canadian trustee's action to continue, the court phrased the test in terms of "prejudice to local creditors and citizens," but seemed to apply the test half-heartedly and not to analyze closely the facts of the case.

debtor commenced Canadian bankruptcy proceedings). For a 1970s case in which a court refused to recognize a foreign proceeding that violated the notions of justice and fairness under United States law, see *Deltec Banking Corp., Ltd. v. Compania Italo-Argentina de Electricidad, S.A.*, N.Y. Sup. Ct. April 3, 1974, 171 N.Y.L.J. 2 (summarized in 68 AM. J. INT'L. L. 741 (1974)), *aff'd* 362 N.Y.S. 2d 391 (1974).

¹⁶⁵ 296 F. Supp. 1190 (D. Haw. 1969).

¹⁶⁶ 544 F.2d 624 (2d. Cir. 1976).

¹⁶⁷ *Waxman*, 296 F. Supp. at 1191.

¹⁶⁸ *Id.* at 1193. It is interesting that much of the opinion seeks to show that the "traditional rule" had been undermined over the years, given that commentators had reached that same conclusion as early as a century before. See Lowell, *supra* note 21, at 260; J. STORY, *supra* note 9, § 420, at 579-80.

¹⁶⁹ *Waxman*, 296 F. Supp. at 1149.

¹⁷⁰ *Id.* (citing *Harrison v. Triplex Gold Mines*, 33 F.2d 667 (1st Cir. 1929)).

¹⁷¹ *Id.* at 1194 (citations omitted).

Although the court noted that no local creditors existed, and therefore could not be prejudiced, the court never addressed whether the defendants, all of whom were Hawaii citizens, would be prejudiced if the court extended comity to the Canadian decree. For instance, the court's opinion failed to consider whether the defendants (who were incorporators and stockholders of the defunct company) had participated in the Canadian proceedings and had received the opportunity to be heard in those proceedings; whether the Canadian proceedings could be collaterally attacked; or whether any actions had been taken in Canada that were contrary to the defendants' interests. The principal territoriality factor stressed by the court (in addition to finding that no local creditors existed) was that the court ordered the Canadian trustee to notify potential local creditors of the proceedings to enable them to intervene and assert that their interests were adversely affected.¹⁷² Overall, the court furthered a pro-recognition comity approach by not strictly applying territoriality terminology.¹⁷³

The decision in *Clarkson*, in comparison, more explicitly limited the application of territoriality principles by narrowly construing territoriality factors. In this case a Canadian bankruptcy trustee brought suit in the U.S. District Court for the Southern District of New York to obtain records located in the New York offices of two bankrupt Canadian corporations.¹⁷⁴ The defendants were officers of the corporations and had custody or control of the records in question. In the court's view, the central issue was whether the Canadian bankruptcy proceeding could be collaterally attacked.¹⁷⁵ The court first set forth a traditional interpretation of comity based on *Hilton v. Guyot* under which "New York courts recognize the statutory title of an alien trustee in bankruptcy, as long as the foreign court had jurisdiction over the bankrupt and the foreign proceeding has not resulted in injustice to New York citizens, prejudice to creditors' New York statutory remedies, or violation of the laws or public policy of the state."¹⁷⁶ But the court quickly limited this protection for local creditors by noting that "[t]hese exceptions are construed especially narrowly when the alien jurisdiction is, like Canada, a sister common law jurisdiction with procedures akin to our own," and cited *Waxman* as an example of a case in which a United States court recognized a Canadian trustee.¹⁷⁷

Unlike the *Waxman* court, the *Clarkson* court addressed a variety of factors before granting recognition to the Canadian judgment. First of all, the court required that any allegations of fraud would have to be pled "with

¹⁷² *Id.* at 1194-95.

¹⁷³ For a interpretation of the case, see Morales & Deutch, *supra* note 3, at 1580 and Unger, *supra* note 3, at 1162.

¹⁷⁴ *Clarkson*, 544 F.2d at 626.

¹⁷⁵ *Id.* at 629.

¹⁷⁶ *Id.* (citation omitted).

¹⁷⁷ *Id.* at 629-30.

particularity”¹⁷⁸ and offer “[c]lear and convincing evidence of fraud . . . in order successfully to attack [the] foreign judgment.”¹⁷⁹ The court found that the defendants had failed to meet this burden.¹⁸⁰ Next, in regard to the defendants’ argument that “New York public policy ha[d] been violated because the Canadian court did not give sufficient weight to New York [law],” the court held that the defendants had “had further opportunities to argue this point [in Canada] but failed to take advantage of them . . . [and that] there [wa]s no indication that the [Canadian] court gave [defendants] less than a full opportunity to present these questions, or less than full consideration to those aspects of New York law and public policy which were presented.”¹⁸¹

By narrowly construing exceptions to the application of comity in cases involving “sister common law jurisdictions,” requiring that allegations of fraud be pled with particularity, and considering the overall fairness of the Canadian proceedings (both in allowing defendants the opportunity to be heard and in having procedures similar to those of the United States),¹⁸² the *Clarkson* court further narrowed the application of a territoriality based notion of comity, and instead espoused the beginnings of a more pro-recognition, more universality based comity approach.¹⁸³

F. *Herstatt, IBB, and Finabank: Reaching the Zenith of the Pre-U.S. Bankruptcy Code Universality Approach and the Need for Reform*

As demonstrated by the cases above, courts throughout the United States responded inconsistently over the years to issues involving the recognition of foreign insolvency proceedings and the claims of foreign representatives. Comity played a role in deciding almost all of the cases, originally under a territoriality approach, but later under a more balanced pro-recognition comity approach. Also, over the years, other universality notions such as the equal distribution of assets and economy of administration began to gain

¹⁷⁸ *Id.* at 630.

¹⁷⁹ *Id.* at 631.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 631-32.

¹⁸² In essence, the *Clarkson* court applied the notion that exceptions to comity should be narrowly drawn when United States citizens in foreign proceedings were accorded protection against fundamentally unfair procedures. For a discussion of fundamental unfairness in the Section 304 setting, see Trautman, *supra* note 3, at 56. See also *Culmer*, 25 Bankr. 621, 631 (applying a universality based comity approach, the court quoted *Cornfeld v. Investor Overseas Servs., Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979), which, in turn, had quoted *Clarkson* about narrowing the exceptions to comity in cases involving sister common law jurisdictions).

¹⁸³ See also *Cornfeld*, 471 F. Supp. 1255 (This case, decided after the U.S. Bankruptcy Code was passed, but before it became effective, further developed the universality comity approach and relied on *Gebhard* and *Clarkson*.) The district court’s decision in *Cornfeld* was affirmed by the Second Circuit. 614 F.2d 1286 (2d Cir. 1979).

some acceptance, as did the notion that local assets should be transferred abroad in assistance of a primary overseas proceeding. But this patchwork of cases created an uncertain climate for foreign companies with assets in the United States, for the creditors of such companies, and for foreign representatives.¹⁸⁴

In the aftermath of the 1973 oil embargo, but before most of the pro-recognition comity cases had been decided, many banks suffered large foreign exchange losses in connection with currency speculation, or encountered other financial problems. The insolvency of three of these financial institutions — Bankhaus I.D. Herstatt K.G.a.A. (Herstatt), Israel-British Bank (London) Ltd. (IBB), and Banque de Financement, S.A. (Finabank) — further demonstrated the inadequacy of the U.S. Bankruptcy Act for handling transnational insolvencies and proved to be the catalyst for the reforms that centered around Section 304 of the U.S. Bankruptcy Code.¹⁸⁵ None of these banks did business in the United States, but all had assets on deposit in the United States. Within a period of nine months, each of these three companies was undergoing bankruptcy or arrangement in a bankruptcy court in the Southern District of New York.

The first of these insolvencies involved Herstatt,¹⁸⁶ a major West German commercial bank. Since Herstatt had not completed a number of foreign exchange contracts, it had millions of dollars on deposit in the United States with its correspondents, including more than US \$150 million with Chase Manhattan Bank (Chase).¹⁸⁷ On June 26, 1974, West German banking authorities ordered Herstatt to be liquidated.¹⁸⁸ When the news reached New York earlier that *same* day, Chase froze Herstatt's account;¹⁸⁹ more than thirty of Herstatt's creditors, in turn, attached the funds. Chase responded by filing a federal interpleader action, and shortly thereafter on August 6, 1974, an involuntary bankruptcy petition was filed against Herstatt to remove the attachments.¹⁹⁰

At first glance, it would appear that the bankruptcy strategy would be successful, since the attachments occurred within four months of the filing of a bankruptcy petition¹⁹¹ and since the U.S. Bankruptcy Act provided for

¹⁸⁴ See Unger, *supra* note 3, at 1163; Gitlin, Flaschen & Grimes, *supra* note 3, at 70.

¹⁸⁵ Paskay, *supra* note 14, at 334. See also Unger, *supra* note 3, at 1163; Note, *Section 304*, *supra* note 3, at 547-48.

¹⁸⁶ For a more detailed description of the case, see Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A. J. 1290 (1976) [hereinafter *Case of Herstatt*]; Becker, *Transnational Insolvency Transformed*, 29 AM. J. COMP. L. 706 (1981) [hereinafter *Transnational Insolvency*]; Nadelmann, *Rehabilitating International Bankruptcy Law*, *supra* note 17; Paskay, *supra* note 14, at 326-30.

¹⁸⁷ See Nadelmann, *Rehabilitating International Bankruptcy Law*, *supra* note 17, at 3.

¹⁸⁸ *Id.* at 4.

¹⁸⁹ See Becker, *Case of Herstatt*, *supra* note 186, at 1291.

¹⁹⁰ *Id.* at 1292-93.

¹⁹¹ *Id.* at 1293.

jurisdiction over nonresident debtors with assets in the United States.¹⁹² However, a question arose whether the U.S. Bankruptcy Act applied to Herstatt; specifically, the issue was whether Section 4(b) of the U.S. Bankruptcy Act, which excluded banking corporations from involuntary bankruptcy, applied to Herstatt, which was a foreign bank *not* engaged in the banking business in the United States.¹⁹³ "This practically unexplored provision, and the potential consequences of its interpretation, became the focus of international attention."¹⁹⁴ On November 4, 1974, a bankruptcy judge heard this issue, but never issued a decision.¹⁹⁵ Given the novelty and complexity of this issue, the inadequacy of the legal rules, as well as the almost certain likelihood of appeal, the parties attempted to settle the matter instead.¹⁹⁶ Less than four months later the parties reached a settlement,¹⁹⁷ in light of which the bankruptcy petition was dismissed.¹⁹⁸ An alternative ground of dismissal was Section 2(a)(22) of the U.S. Bankruptcy Act.¹⁹⁹ This section,

¹⁹² U.S. Bankruptcy Act 2(a)(1), 11 U.S.C.A. § 11(a)(1) (West 1991). *See supra* note 93 and accompanying text.

¹⁹³ The U.S. Bankruptcy Code addresses this problem in section 109(b)(3). This section provides that: "[a] person may be a debtor under chapter 7 of this title only if such person is not . . . (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States." 11 U.S.C.A. § 109(b)(3) (West 1991). Such banking institutions and insurance companies are also excluded from Chapter 11 under section 109(d). *Id.* § 109(d). Such institutions not engaged in such business in the United States may commence a voluntary case under Chapter 7 or Chapter 11, but involuntary proceedings may only be commenced against a foreign bank that is not engaged in such business only under Chapter 7 and only if a foreign proceeding concerning such bank is pending. *Id.* §§ 301, 303(k).

¹⁹⁴ Nadelmann, *Rehabilitating International Bankruptcy Law*, *supra* note 17, at 3.

¹⁹⁵ Becker, *Case of Herstatt*, *supra* note 186, at 1293.

¹⁹⁶ Becker, *Transnational Insolvency*, *supra* note 186, at 708-10. Another problem in *Herstatt* was that the foreign representative decided "not to subject himself to the jurisdiction of the U.S. court" because he feared the effects of a full appearance and a limited appearance was not available at that time under United States law. Gitlin, Flaschen & Grimes, *supra* note 3, at 71. This was a recurring problem under the U.S. Bankruptcy Act. *Id.* at 70. This problem has been resolved under the U.S. Bankruptcy Code by Section 306. 11 U.S.C.A. § 306 (West 1991).

¹⁹⁷ Becker, *Transnational Insolvency*, *supra* note 186, at 710. For more detail, *see id.* at 706-10; Becker, *Case of Herstatt*, *supra* note 186, at 1294-95; Nadelmann, *Israel-British Bank (London) Ltd: Yet Another Transatlantic Crossing*, 52 AM. BANKR. L.J. 369 (1978) [hereinafter *Israel-British Bank*]; Nadelmann, *Rehabilitating International Bankruptcy Law*, *supra* note 17, at 1-11.

¹⁹⁸ Nadelmann, *Rehabilitating International Bankruptcy Law*, *supra* note 17, at 9-10.

¹⁹⁹ Nadelmann, *Israel-British Bank*, *supra* note 197, at 369. Enacted under the 1962 Amendment to the U.S. Bankruptcy Act, former Section 2(a)(22) authorized a bankruptcy court to "[e]xercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent

part of the 1962 Amendment to the U.S. Bankruptcy Act, enabled bankruptcy courts to suspend or dismiss proceedings in the United States after considering the rights or convenience of local creditors and all other circumstances.

While the *Herstatt* matter was pending, a bankruptcy case involving IBB also arose in a bankruptcy court for the Southern District of New York, but before a different bankruptcy judge.²⁰⁰ In this case, Judge Galgay, also working within the rudimentary confines of the U.S. Bankruptcy Act, staunchly supported the universality notions of equality of distribution and economy of administration set forth in some of the earlier cases and did his best to promote cooperation in transnational insolvencies.

IBB, a British bank, did not conduct banking operations in the United States.²⁰¹ It did, however, borrow from and maintain deposits with United States banks,²⁰² and in July 1974, IBB was unable to pay back two loans which became due to two of these banks.²⁰³ The banks responded by obtaining attachment of IBB's bank deposits with other United States banks.²⁰⁴ Meanwhile, in England on August 2, 1974, IBB voluntarily commenced winding-up proceedings pursuant to Section 222 of the English Companies Ordinance. The English High Court made a receiving order on August 6, 1974, a winding-up order on December 2, 1974, and in January 1975, appointed liquidators.²⁰⁵ In the interim, on September 23, 1974, IBB filed a voluntary bankruptcy petition in the Southern District of New York to avoid the preferential attachments of its assets and to ensure that its local assets "would become available for all general creditors and distributed among them equally."²⁰⁶

As in *Herstatt*, the local attaching creditors claimed that IBB was a "banking corporation" not entitled to protection under the U.S. Bankruptcy Act and moved to dismiss the petition.²⁰⁷ Unlike in *Herstatt*, a decision was reached. Judge Galgay rejected the local creditors' assertion and denied the motion to dismiss, holding that IBB was not a "banking corporation" under

jurisdiction without the United States." 11 U.S.C.A. § 11(a)(22) (West 1991). See Nadelmann, *Israel-British Bank*, *supra* note 197, at 369.

²⁰⁰ *In re Israel-British Bank (London) Ltd.*, No. 74-B-1322 (Bankr. S.D.N.Y. Sept. 23, 1974).

²⁰¹ *In re Israel-British Bank (London) Ltd. v. Federal Deposit Ins. Corp.*, 536 F.2d 509, 510 (2d Cir. 1976), *cert. denied sub. nom. Bank of the Commonwealth v. Israel-British Bank (London) Ltd.*, 429 U.S. 978 (1976) [hereinafter *IBB*].

²⁰² *IBB*, 536 F.2d at 510.

²⁰³ *Id.*

²⁰⁴ *Id.* at 510-11.

²⁰⁵ *Id.* at 511.

²⁰⁶ *In re Israel-British Bank (London) Ltd.*, No. 74-B-1322 (Bankr. S.D.N.Y. Jan. 5, 1978), Findings of Fact, ¶ 15 (Jan. 5, 1978) [hereinafter *IBB* (Findings)], *reprinted in* Nadelmann, *Israel-British Bank*, *supra* note 197, at 375.

²⁰⁷ *IBB*, 536 F.2d at 511.

the U.S. Bankruptcy Act and was therefore not precluded from filing a voluntary bankruptcy petition.²⁰⁸

The district court reversed and the matter was heard by the Court of Appeals for the Second Circuit, which upheld Judge Galgay's original ruling.²⁰⁹ The court of appeals held that the exclusion of "banking corporations" from the U.S. Bankruptcy Act did not apply to foreign banks not doing business in the United States.²¹⁰ The court reasoned that banking corporations had been excluded from the U.S. Bankruptcy Act because there was other legislation, both federal and state, to deal with the liquidation of such companies.²¹¹ However, since these other regulations did not apply to the liquidation of foreign banks not doing business in the United States,²¹² the court decided:

We can find no convincing reason why a foreign banking corporation, not licensed to do business in the United States, conducting no semblance of a banking business here, and not under the regulatory supervision of any state or federal agency, should not qualify for the benefits of the [U.S.] Bankruptcy Act as a voluntary bankrupt.²¹³

In its ruling the court also stressed that "[t]he theme of the Bankruptcy Act is equality of distribution of assets among creditors. . . . The road to equity is not a race course for the swiftest."²¹⁴ The court was especially concerned that if the preferential liens survived, unsecured creditors, including other American banks that lost the race of the swiftest, would be harmed.²¹⁵ In other words, rather than protecting the interests of fast-moving local creditors whose liens would remain if the bankruptcy proceedings were dismissed, the court protected the interests of unsecured creditors.²¹⁶

After the court of appeals reversed the order dismissing the petition, Judge Galgay, of course, still had to work out the framework for enabling the United States proceeding to assist the primary proceeding abroad. In the primary proceeding, pursuant to the English Companies Act the creditors approved a composition plan, which was approved by the English High Court.²¹⁷ Thereafter, in December 1976 the English liquidators paid the initial dividend under the court-approved plan to all creditors of IBB, including those United States creditors who had filed claims in the United States bank-

²⁰⁸ *Id.* at 512.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 514-15.

²¹¹ *Id.* at 513-14.

²¹² *Id.* at 513, 515.

²¹³ *Id.* at 513.

²¹⁴ *Id.* (citations omitted).

²¹⁵ *Id.* at 515.

²¹⁶ *Id.*

²¹⁷ *IBB* (Findings), *supra* note 206, ¶¶ 8-10, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 373-74.

ruptcy proceeding.²¹⁸ In the United States, meanwhile, the trustee in bankruptcy for IBB exercised his avoiding powers and amassed for distribution a bankruptcy estate of several million U.S. dollars.²¹⁹ The question arose of what to do with those assets. Before Judge Galgay ruled on this matter, the Court of Appeals for the Second Circuit issued another decision regarding transnational insolvency, in the case involving Finabank.²²⁰

Finabank, a Swiss banking corporation, also not doing business in the United States, ran into financial difficulties after suffering foreign exchange losses in December 1974.²²¹ In January 1975 Finabank filed a petition in Switzerland for a "sursis bancaire," or postponement of maturity.²²² After its financial position continued to worsen, Finabank withdrew its "sursis bancaire" petition and substituted a petition for a "sursis concordataire," or banking moratorium.²²³ When it became apparent that prospects for reorganization were bleak, Finabank's court appointed commissioners filed a petition for a "concordat par abandon d'actifs," or court supervised liquidation.²²⁴ In December 1976 the Swiss Court of Justice ordered Finabank's liquidation.²²⁵

Meanwhile, Finabank was also confronting difficulties in the United States. Finabank defaulted on its foreign exchange contracts owed to two New York banks, which responded by securing orders of attachment against Finabank's assets in the United States.²²⁶ On May 5, 1975, a few hours before the expiration of the four-month limitation period for avoiding preferences under the U.S. Bankruptcy Act, Finabank filed a petition for Chapter XI protection.²²⁷

The local creditors with attachments requested the bankruptcy court to dismiss the petition pursuant to the court's discretion under Section 2(a)(22) of the U.S. Bankruptcy Act and under Bankruptcy Rule 119,²²⁸ asserting

²¹⁸ IBB (Findings), *supra* note 206, ¶ 13, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 373-74.

²¹⁹ IBB (Findings), *supra* note 206, ¶ 19, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 373-74.

²²⁰ *In re Banque de Financement, S.A.*, 568 F.2d 911 (2d Cir. 1977) [hereinafter *Finabank*]; see Nadelmann, *Israel-British Bank*, *supra* note 197, at 370.

²²¹ *Finabank*, 568 F.2d at 913.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 914.

²²⁷ *Id.*

²²⁸ Enacted in 1973, Bankruptcy Rule 119 was derived from Section 2(a)(22) of the U.S. Bankruptcy Act, but also applied when a rehabilitation action had been filed abroad. Former Bankruptcy Rule 119 provided:

When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to

that their rights to be protected were their preferential claims and attachments.²²⁹ The bankruptcy court agreed with this interpretation of local creditors' "rights" and cited the proposition from *Disconto Gesellschaft* "that a country 'first protect[s] the rights of its citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond its borders.'"²³⁰ On January 12, 1976, the bankruptcy court dismissed the petition, citing two reasons: (1) that Finabank was excluded from seeking relief under the U.S. Bankruptcy Act since it was a "banking corporation;" and (2) that the arrangement could not "comply with the most elementary and preliminary provisions of the [U.S. Bankruptcy] Act, much less with successful end result" and that "there was 'neither purpose to achieve the desired result nor likelihood of doing so.'"²³¹ The district court affirmed on the second ground alone, since the Second Circuit's *IBB* decision of May 25, 1976 foreclosed the first ground.²³² Finabank appealed to the Court of Appeals for the Second Circuit.²³³

The court of appeals reversed and in so doing set forth guidelines for the exercise of a bankruptcy court's discretion to dismiss a Chapter XI petition.²³⁴ First of all, the court upheld the right of a foreign debtor to file a Chapter XI petition to avoid preferences,²³⁵ reasoning that "in view of the objective of the [U.S.] Bankruptcy Act of insuring equal distribution of assets among general creditors, such filings should not be discouraged, even under Chapter XI."²³⁶ The court then stated that Section 2(a)(1) of the U.S. Bankruptcy Act contemplated that foreign debtors could invoke the U.S. Bankruptcy Act "to obtain an administration of assets located in this country ancillary to an administration of assets in its foreign domicile."²³⁷ The court added that "[Section 2(a)(1)], by providing a jurisdictional underpinning in property located in this country, fosters in international situations one of the basic purposes of the [U.S. Bankruptcy] Act, i.e. equal distribution among creditors."²³⁸

the petitioner or petitioners and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

11 U.S.C. app. rule 119 (1976).

²²⁹ *Finabank*, 568 F.2d at 921.

²³⁰ *Id.* at 921 (citing Bankruptcy Court citing *Disconto Gesellschaft*, 208 U.S. at 570, 582).

²³¹ *Finabank*, 568 F.2d at 915 (citing Bankruptcy Court) (The Bankruptcy Court was concerned that Finabank had not submitted a plan or filed a complete list of creditors.)

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 915-22.

²³⁵ *Id.* at 917-19.

²³⁶ *Id.* at 917 (citing *IBB*, F.2d at 513).

²³⁷ *Finabank*, 568 F.2d at 918.

²³⁸ *Id.*

In this fashion, the Second Circuit bolstered the universality approach analysis it had earlier espoused in *IBB*. Building on Judge Lowell's reforms,²³⁹ the court determined that the factors encouraging the cooperation of courts in cross-border insolvencies and furthering the equality of distribution outweighed parochial protection of United States creditors holding preferential liens, even if this meant that United States courts would serve in an ancillary capacity "essentially as an instrument to set aside preferences."²⁴⁰ Thus, the court explicitly rejected the bankruptcy court's view, based on *Disconto Gesellschaft*, that preferential attachments were "rights" to be protected by the United States courts. In the Second Circuit's view, the "rights" to be protected were the rights of creditors against being forced "to participate in foreign proceedings in which their claims will be treated in some manner inimical to this country's policy of equality."²⁴¹

The Second Circuit also stressed the importance of flexibility in handling international bankruptcies.²⁴² As *Finabank* suggested, there were two possible ways to coordinate the United States and Swiss proceedings and to resolve the problem that the Swiss company had never filed a list of creditors with the United States court:

First, § 2(a)(22) and Rule 119 might be utilized. The bankruptcy court would take jurisdiction, set aside the attachments, and then suspend the proceeding and permit the assets located in this country to be administered in the Swiss proceeding. Under the second alternative, there would be a full administration in this country, coordinated with the Swiss proceeding. The Swiss court would notify the depositors who then would elect whether to appear in the proceeding here. Pro rata distribution would be achieved eventually by marshalling of assets in Switzerland which would take into account the recoveries of the creditors who appear here.²⁴³

While the court drew no conclusions regarding these alternatives and left them for the bankruptcy court,²⁴⁴ the proposal that the U.S. Bankruptcy Court should serve in either a primary or ancillary role was later adopted in Sections 303(b)(4) and 304 of the U.S. Bankruptcy Code, respectively.²⁴⁵

The final principle stressed by the court was economy of administration.²⁴⁶ The court noted that "Section 2(a)(22) was enacted as an administrative reform. It was designed to avoid needless duplication of effort by courts and creditors in those cases where an ancillary proceeding in this country could

²³⁹ See Lowell, *supra* note 21.

²⁴⁰ *Finabank*, 568 F.2d at 918-19.

²⁴¹ *Id.* at 921.

²⁴² *Id.* at 919.

²⁴³ *Id.* at 920.

²⁴⁴ *Id.* at 920 n.18.

²⁴⁵ See 11 U.S.C.A. §§ 303(b)(4), 304 (West 1991).

²⁴⁶ *Finabank*, 568 F.2d at 921.

be coordinated with or entirely dismissed in favor of a domiciliary proceeding abroad."²⁴⁷

In both *IBB* and *Finabank*, fundamental changes appeared regarding the appropriate principles for solving transnational insolvency issues. Strikingly, a discussion of comity does not appear in either decision. The Second Circuit did not enter the debate about whether territoriality or universality notions of comity should be applied. Rather, the court stressed that principles of equality of distribution, international cooperation among bankruptcy courts, and economy and efficiency of administration were to be applied. The protection of the interests of local creditors, including unsecured United States creditors, was to be considered within the framework of these principles.

In *Finabank*, the Second Circuit's framework of alternatives never had to be implemented by the bankruptcy court because the parties finally reached agreement on the liquidation of the New York assets and on the dismissal of the Chapter XI petition.²⁴⁸ *Finabank* thus "ended in the Herstatt-type style."²⁴⁹ But the Second Circuit's framework proved to be helpful to Judge Galgay in his structuring of the administration of *IBB*. As mentioned above, after avoiding the preferential transfers, the trustee in the United States liquidation had amassed several million dollars in the *IBB* bankruptcy estate for distribution to creditors.²⁵⁰ Judge Galgay followed the first alternative proposed by *Finabank* in its case — he suspended the United States proceedings and ordered the transfer of these funds to the English liquidators to be administered by them for the benefit of all creditors of *IBB*.²⁵¹ During the time between the commencement of the winding-up proceedings in England and Judge Galgay's transfer order years later, the U.S. dollar had risen about 11% as against the British pound sterling,²⁵² and Judge Galgay had to address the issue of as of what date the currency conversion should be made. He stressed "[t]hat it is a principle of English law, just as it is of American bankruptcy law that equality is equity."²⁵³ He also relied on *Gebhard* in holding that the United Kingdom scheme was binding on all creditors who filed claims in the United States proceeding and that therefore all foreign debts would be converted to pounds sterling at the rate of exchange prevailing at the date of the winding up order in the United Kingdom.²⁵⁴

²⁴⁷ *Id.*

²⁴⁸ Nadelmann, *Israel-British Bank*, *supra* note 197, at 370 n.5.

²⁴⁹ *Id.*

²⁵⁰ See *supra* note 219 and accompanying text.

²⁵¹ See *In re Israel-British Bank (London) Ltd.*, No. 74-B-1322 (Bankr. S.D.N.Y. Jan. 5, 1978), Conclusions of Law, ¶¶ 5-6, (Jan. 5, 1978) [hereinafter *IBB* (Conclusions)] reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 381.

²⁵² *IBB* (Findings), *supra* note 206, ¶ 22-24, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 377-78.

²⁵³ *IBB* (Findings), *supra* note 206, ¶ 26, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 378.

²⁵⁴ *IBB* (Conclusions), *supra* note 251, ¶ 1, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 380.

In his conclusions of law, Judge Galgay relied on *Finabank* for a variety of propositions—equality of distribution, the need for cooperation among bankruptcy courts in cross-border insolvencies, and economy and efficiency of administration. First, Judge Galgay noted that Section 2(a)(1) of the U.S. Bankruptcy Act “could be invoked by IBB for the specific purpose of avoiding preferential attachments and to obtain an administration of its assets in this country ancillary to an administration of its principal assets located in its foreign domicile — the United Kingdom” and added that “[this] section, by providing a jurisdictional underpinning in property located in this country, fosters in international situations one of the basic purposes of the [U.S.] Bankruptcy Act, i.e. equal distribution among creditors.”²⁵⁵ Next, Judge Galgay held that Section 2(a)(22) of the U.S. Bankruptcy Act and Bankruptcy Rule 119 enabled a bankruptcy court to “exercise its discretion to dismiss the proceeding, or, after setting aside any preferences to suspend the proceeding and permit assets located in this country to be administered pursuant to the domiciliary proceeding.”²⁵⁶ And third, he also held that Section 2(a)(22) of the U.S. Bankruptcy Act and Bankruptcy Rule 119 were enacted to “avoid needless duplication of effort by courts and creditors” when coordinating an ancillary proceeding in the United States with a primary proceeding abroad.²⁵⁷

Judge Galgay also considered the interests of United States creditors—his final conclusion of law stated that the relief he was ordering “would have regard to the rights and convenience of local creditors.”²⁵⁸ Judge Galgay conditioned the turnover of the United States assets to be distributed abroad on the prepayment of the administration expenses, including the attorneys’ and trustees’ fees and expenses. He also conditioned the turnover order on providing for the payment of a certain priority lien claim.²⁵⁹

Judge Galgay’s turnover order marked the zenith of the evolution and growing acceptance of the pre-U.S. Bankruptcy Code universality approach. By suspending the bankruptcy proceedings in the United States and furthering the cooperation with the primary proceeding in the United Kingdom, Judge Galgay intended that his order:

would avoid litigation and protracted appeals therefrom; would avoid enormous costs and expenses to this estate; would avoid a further and undue delay in making a further distribution to all the unsecured credi-

²⁵⁵ *IBB* (Conclusions), *supra* note 251, ¶ 2, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 380-81 (citing *Finabank*, 568 F.2d at 911).

²⁵⁶ *IBB* (Conclusions), *supra* note 251, ¶ 3, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 381 (citing *Finabank*, 568 F.2d at 911).

²⁵⁷ *IBB* (Conclusions), *supra* note 251, ¶ 4, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 381 (citing *Finabank*, 568 F.2d at 911).

²⁵⁸ *IBB* (Conclusions), *supra* note 251, ¶ 6, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 381.

²⁵⁹ *IBB*, Order ¶¶ 1-4 (Jan. 5, 1978); *IBB*, Order Authorizing Trustee to Turn Over Funds to U.K. Liquidators and to Pay Administration Claims (Dec. 19, 1978).

tors of IBB; would preserve the principle of equality of distribution among all the unsecured creditors of IBB; would avoid needless duplication of effort by courts and creditors and would prevent this court and appellate courts, already overburdened, and the litigants from going through a meaningless and futile exercise.²⁶⁰

IV. CONCLUSION

The transnational aspects of United States insolvency law underwent fundamental changes from 1809, when Justice Marshall set forth his strict territoriality language in *Harrison*, through 1978, when Judge Galgay espoused many universality principles and closely cooperated with English liquidation proceedings in *IBB*.

The early cases applied a territoriality approach, which was primarily concerned with protecting the interests of local creditors when they conflicted with the claims of foreign representatives and cooperating with foreign proceedings when they did not. With *Gebhard* and the writings of Judge Lowell (which resulted in the amendment to United States bankruptcy law providing for jurisdiction over non-resident debtors and thereby for the avoidance of preferential attachments in bankruptcy cases involving non-resident debtors), the universality approach began to emerge. However, in 1895 in *Hilton*, the U.S. Supreme Court set forth a narrow view of comity, and in 1908 in *Disconto Gesellschaft*, upheld the rights of states to continue to apply territoriality principles and to prefer the interests of United States creditors in non-bankruptcy cases involving cross-border insolvency issues.

The courts in *Norske Lloyd* and *Kreuger & Toll* began to develop a more universality-oriented, flexible approach in two insolvency cases involving disputes between local creditors and foreign representatives. Finally, in the 1970s, many courts showed a greater desire to cooperate in cross-border insolvencies and the use of the territoriality approach began to give way in a number of reported cases. Some of these courts followed a pro-recognition comity approach, as illustrated by *Waxman* and *Clarkson*. In contrast, the Second Circuit in *IBB* and *Finabank* more clearly espoused the universality approach. For example, in *IBB*, the Second Circuit and Bankruptcy Judge Galgay took full advantage of Judge Lowell's reform of basing jurisdiction on the presence of assets in the United States and avoided the preferential liens of United States creditors, thereby protecting the interests of unsecured creditors, furthering equality of distribution to creditors worldwide, improving cooperation among bankruptcy courts in cross-border insolvencies, and ensuring the economy and efficiency of administration. It is significant that in his Conclusions of Law in *IBB*, Judge Galgay resurrected and relied on *Gebhard*. Thus, the exception had to a great extent become the norm.

This does not mean, however, that the universality approach had com-

²⁶⁰ IBB (Findings), *supra* note 206, ¶ 30, reprinted in Nadelmann, *Israel-British Bank*, *supra* note 197, at 380.

pletely replaced the territoriality approach. Although Section 304 of the U.S. Bankruptcy Code attempted to resolve many of the inadequacies of the U.S. Bankruptcy Act and to provide guidance for the judiciary in transnational insolvency matters, courts have interpreted Section 304 inconsistently, and the debate about the universality and territoriality approaches continues. A clearer understanding of the evolution in the transnational aspects of United States insolvency law during the two centuries prior to the Bankruptcy Reform Act of 1978 might well assist in the resolution of that debate, and in the continued development of the universality approach.